VAUGHN WALKER ISSUES FINAL AL-HARAMAIN OPINION ON DAMAGES AND ATTORNEY FEES

As you may recall, Chief Judge Vaughn Walker of the Northern District of California (NDCA), who has handled two of the most critical and transcendent litigations of the last decade, Perry v. Schwarzenegger and al-Haramain v. Bush/Obama, is retiring. Today, he has issued his last big opinion left on his table pre-retirement, the ruling on damages to be awarded Plaintiff in al-Haramain, assignment of attorney fees to Plaintiffs, and whether or not to impose punitive damages against the government for their offending illegal conduct.

The government, in its brief objecting to the Plaintiffs' proposed form of judgment, basically poked the court in the eye with a stick by continuing their obstreperous refusal to accept the court's jurisdiction over their assertion of state secrets, continued to argue there were no facts competently of record despite Walker's crystal clear determinations to the contrary, and denied that Plaintiffs were entitled to attorney fees or punitive damages. They just say NO. The Plaintiffs went on to properly lodge their calculation of damages, detailed request for attorney fees and affidavit in support thereof. Plaintiffs al-Haramain, separately, filed a very compelling brief on why the court should award them punitive damages against the government. The government, of course, objected some more.

As lead Plaintiffs counsel Jon Eisenberg stated in the punitive damages brief:

> Defendants abused the extraordinary power of the Executive Branch by

> committing unlawful electronic surveillance of the plaintiffs with full knowledge of, and in flagrant disregard for, determinations by top officials in the Department of Justice (DOJ) that the surveillance lacked constitutional or other legal support. Defendants sought to put themselves above the law, in the manner of a monarch. That is a profound abuse of America's trust. It calls for strong medicine.

And thus it all comes down to today's decision by Judge Walker, and here is the full text of his 47 page order.

In short, Walker has ordered that Plaintiffs Wendell Belew and Asim Ghafoor (a-Haramain's attorneys wrongfully surveilled) receive $20,400.00 each in liquidated damages. Walker denied damages to al-Haramain itself. In regards to punitive damages, Judge Walker has denied in full Plaintiffs' request. As to attorney fees, the court grants the motion as to Plaintiffs Ghafoor and Belew only (again, not as to al-Haramain itself, and awards attorney fees and expenses in the amount of $2,537,399.45.

There is a lot to chew on in this order, and both Marcy and I will be coming back to do just that after chewing and digesting it further. But so far, it is clear that the court sided completely with the plaintiffs on compensatory/liquidated damages, giving Belew and Ghafoor every penny they asked for and finding the government's opposition meritless. This passage by the court is telling:

> The evidence shows that an inferred surveillance period lasting from February 19, 2004 to September 9, 2004 is reasonable. Based on statements by the Office of Intelligence and Analysis, at least four of al-Buthi's telephone calls were intercepted as early as February 2003. Doc #657-4/99-4 at 32-38. Between this time and September 9, 2004,

> when the OFAC declared Al-Haramain a SDGT organization, governmental interest in Al-Haramain's activities appears to have increased. Various officials involved acknowledged using surveillance and other classified information in this investigation. See Doc #721/115 at 37-41.
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> Accordingly, the most reasonable inference is that defendants had already begun electronic surveillance of Al-Haramain before its assets were blocked on February 19, 2004 and continued the surveillance at least through September 9, 2004. Plaintiffs Belew and Ghafoor were associated and in frequent contact with Al- Haramain and its officials during this time and were similarly subjected to electronic surveillance. See Doc ##657-6/99-6; 657- 23 7/99-7. Although plaintiffs have not had access to classified information that could prove the precise details of defendants' surveillance, plaintiffs have nevertheless put forth sufficient evidence to raise a strong inference that the period of surveillance lasted at least 204 days.

Walker, and likely correctly, notes (see: p. 14-15) that al-Haramain itself is not eligible for damages or attorney fees due to its status as a designated terrorist organization. The court rejected Eisenberg's relatively creative attempt to get the damages awarded under the "*cy pres*" doctrine.

As to Plaintiffs' request for injunctive relief, the court effectively holds they already have all they can get under the circumstances in light of the "surveillance program" being discontinued (could sure be argued that this is a pretty shaky assumption) among other circumstances:

> The court first turns to plaintiffs'

> request for a declaration that the warrantless electronic surveillance of plaintiffs was unlawful as a violation of FISA. Defendants argue that FISA does not authorize the entry of any declaratory relief. Doc #727/119. Defendants further argue that a declaratory judgment cannot issue if the "program or activity" no longer exists. Doc 15 #727/119.
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> It is unnecessary to decide whether and under what circumstances FISA authorizes the entry of a declaratory judgment because the equitable relief sought by plaintiffs is neither necessary nor appropriate. This court already determined in its March 31 order that plaintiffs established a prima facie case of unlawful electronic surveillance in violation of FISA. Doc #721/115 at 3. In the present order, the court awards compensatory damages and attorney fees based on defendants' actions. A declaration that defendants' actions were illegal would not provide plaintiffs with any additional relief or remedy.
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> Furthermore, because the TSP under which plaintiffs were monitored in violation of FISA ended in January 2007, Doc #668/103 at 18, there is no reason to believe that plaintiffs will be subjected to the same injury in the future. Under 28 USC § 2201, a declaratory judgment is available only when there is "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." Golden v Zwickler, 394 US 103, 5 108 (1969). "[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." City of Los Angeles v Lyons, 461 US 95, 103 (1983).

> Accordingly, plaintiffs' request that the court declare defendants' actions unlawful is DENIED.
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> Plaintiffs' second request for equitable relief seeks an order prohibiting the United States government from using any information obtained during the surveillance at issue and ordering the destruction of such information. Again, to enter declaratory relief, there must be an "actual controversy" before the court. 28 USC § 2201. No such controversy exists here.

To sum up, a strong damages ruling, nice and full award of attorney fees (well earned by plaintiffs' counsel I might add), a predictable refusal to grant monetary award to the underlying organization (which is defunct anyway) and a somewhat disappointing refusal to grant punitive damages. The court's logic on the punitives issue is fairly underwhelming to me – basically that it is unfair to assess them against taxpayers – in that I fail to see why the "send a message" nature of punitive damages is any less necessary where it is governmental ill at issue. Taxpayers need the damn message too judge. Walker clearly, however, does not agree.

This will conclude the festivities in NDCA. As you may recall, the government prematurely tried to get the matter to the 9th Circuit on an interlocutory basis in early 2009, but the attempt was held to not be ripe and was denied completely. Well, there are no more issues left at the trial court level, so the Obama Administration can now finally move its craven determination to shield mass criminal conduct through the secrecy and cover up of state secrets privilege to the 9th Circuit. After the soul crushingly bad *en banc* decision by the 9th in Mohamed v. Jeppesen, however, there is no way to know how the case will be viewed there. Normally, I would expect a favorable ear from the 9th, but the craven government has so brain

washed the judiciary on the need for secret law to stave off the terror boogeyman, that you never know. And Obama has literally been as bad, if not far worse than, as the Bush Administration in this regard.

So, we shall see how this sorts out in the 9th Circuit now and, presumably, the Supreme Court after that. While it has been very hard to get a definitive read on our newest justice, Elena Kagan, on these types of issues, it is almost certain she would recuse herself as much of al-Haramain and related cases were percolating through during her term as Solicitor General and she likely had enough participation in the discussions that she exercises her right to recuse. Now, whether that would leave a 4-4 split among the remaining eight justices, which would leave any opinion by the 9th Circuit intact, may well be the key question in the future.

For now, though, the trial court, through chief Judge Vaughn Walker hath spoken. And his finding of mass illegality and unconstitutionality in the the President's Surveillance Program during the Bush Administration, in the only case that has managed to survive the egregious onslaught of state secrets coverup, by both Bush and Obama, should be kept firmly in mind. Especially when you read things like *Monitoring America* by Dana Priest and Bill Arkin of the Washington Post.